**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| JILLET HARLEY,<br><br>Claimant,<br><br>v.<br><br>OASIS STOP & GO #5,<br><br>Employer,<br><br>and<br><br>ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY and STATE INSURANCE FUND,<br><br>Sureties,<br><br>and<br><br>STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,<br><br>Defendants. | ) | **IC 02-008882**<br>**03-502881**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>Filed September 11, 2006 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on September 22, 2005. Claimant was present and represented by Jeff Stoker of Twin Falls. Anthony M. Valdez, also of Twin Falls, represented Defendant Idaho Industrial Special Indemnity Fund (ISIF). This is a consolidated case involving two separate accidents with two separate sureties. Employer and its sureties settled with Claimant prior to hearing. Oral and documentary evidence was presented and the record remained open for the taking of one post-

hearing deposition. The parties then submitted post-hearing briefs and this matter came under advisement on June 16, 2006.

## ISSUES

The issues to be decided as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to permanent total disability (PTD) in excess of permanent partial impairment (PPI);

2. Whether Claimant is entitled to PTD pursuant to the odd-lot doctrine;

3. Whether ISIF is liable pursuant to Idaho Code § 72-332; and,

4. Apportionment under the *Carey* formula.

## CONTENTIONS OF THE PARTIES

Claimant contends she is totally and permanently disabled as the result of a combination of various pre-existing conditions including a back injury, stroke, and heart disease, and two accidents that are the subject of this claim. Because her last industrial accident combined with her pre-existing conditions rendered her totally disabled, ISIF is liable for a portion of that total disability. Further, even though her IME physicians do not believe Claimant is medically stable, she is unable to afford the treatment they are recommending and, therefore, she is as stable as she is going to get.

ISIF responds that the injury she claims rendered her totally and permanently disabled was non-industrial and did not combine with her pre-existing conditions to result in total disability. In the alternative, ISIF argues that Claimant is not medically stable and her IME physicians are recommending further treatment that may result in diminished disability and she should be afforded the opportunity to explore their recommendations.

Claimant did not file a Reply Brief but filed a document entitled Notice of Submission of Case for Final Decision. In that document Claimant states: "The claimant has filed an objection to the consideration of ISIF's brief." No such objection is found in the Industrial Commission's file and, thus, cannot be considered.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and her husband, John Harley, taken at the hearing;

2. Joint Exhibits A-Y admitted at the hearing; and,

3. The post-hearing deposition of vocational consultant Jason Spooner taken by Claimant on November 3, 2005.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## FINDINGS OF FACT

1. Claimant was 52 years of age and resided in Jerome at the time of the hearing.

2. At the time of the subject accidents, she was employed at Employer's convenience store in Jerome as a cashier. Her duties also included stocking, sweeping, mopping, and trash removal.

**1st accident – 4/26/02:**

3. On April 26, 2002, Claimant slipped and fell on the floor where she had just mopped, hitting her head on the step going up to the cash register, and her left arm hit a shelf. She complained of a stiff neck, back and hip pain, and right shoulder pain. She first sought medical attention on April 29, 2002, when she presented to Laura Johnson, D.C. Dr. Johnson did whatever chiropractors do, presumptively manipulations, and, on May 6, 2002, placed Claimant

on light duty for two weeks at which time Claimant returned to full duty work. Claimant saw Doug Stagg, M.D., at Occupational Health, on June 3, 2002. Dr. Stagg diagnosed neck and back pain with a right arm radiculopathy. He put a hold on her chiropractic care and prescribed physical therapy. He did not restrict her work activities. After Claimant successfully completed physical therapy, Dr. Stagg released her from his care on June 19, 2002.

**2nd accident – 1/25/03:**

4. On January 25, 2003, Claimant was standing on a box trying to put something on a shelf, and when she stepped down, her ankle twisted and she fell against a milk crate stacked against a wall with the mid-section of her back. She felt pain in her neck and shoulder, and felt a knot under her shoulder blade and across her back. Claimant presented to the St. Benedicts' Emergency Room in Jerome about 90 minutes after her fall complaining of right rib pain. An x-ray did not reveal any obvious fracture. She was given Vicodin and Norco and taken off work until released by her primary caregiver.

5. Claimant returned to Dr. Stagg on January 27, 2003. She was complaining of bilateral chest injuries. Dr. Stagg prescribed Naprosyn and Vicodin and took her off work. On January 29, Dr. Stagg released Claimant to work for 4 hours a day at cashier work only. On February 4, 2003, Dr. Stagg noted that Claimant had tolerated her restricted work release and released her to full duty, although he still restricted her from lifting, pushing, or pulling over 10 pounds at her request. Dr. Stagg released her to full duty without restrictions on February 18, 2003.

**The "alarm clock incident" – 4/8/03:**

6. Claimant testified that on April 8, 2003: "And I hadn't been released off of restricted duty very long before the pain in my arm all started when I rolled over to shut the

alarm off. I just rolled over to shut the alarm off, and I reached, and just pain - - burning pain shot up through my arm and neck, and it was just this whole section." Hearing Transcript p. 20, emphasis added.

7. Claimant presented to the St. Benedicts' Emergency Room shortly after the alarm clock incident complaining of chest, right shoulder, and arm pain. She gave a history of waking from sleep with the pain, but did not mention that she was shutting off her alarm. She was "writhing in pain" and holding her right upper arm. Exhibit J. During her two-and-a-half-hour hospital stay, her pain diminished but did not entirely disappear. She was diagnosed with right arm pain, likely a muscle spasm, possibly caused by hypokalemia (a potassium deficiency).

8. On April 10, 2003, Claimant returned to Dr. Stagg who notes, "She was doing fairly well until she awakened Tuesday morning 4-8-03 with severe pain in the right side of her neck, down into her shoulder blade area, her shoulder and her arm with accompanying numbness of the right hand." Exhibit M. Dr. Stagg diagnosed severe right-sided neck, parascapular and shoulder pain with right arm painful radiculopathy. He prescribed medications and took Claimant off work.

9. Claimant has not worked or sought work since the alarm clock incident.

10. Claimant returned to Dr. Stagg in follow-up on April 14, 2003, at which time he noted, "In talking with her further when she awakened on Tuesday morning 4-8-03 she said she was reaching for her alarm clock to shut it off when she had immediate pain in the right side of her neck, shoulder, scapular area and into the right elbow. She has been miserable ever since." *Id*. Dr. Stagg was concerned about the etiology of her complaints:

> I have told Jillett that I am concerned about the nature of her present discomfort in that the fall from 1-25-03 seemed to be more chest and low back injuries. She did have a similar presentation from a fall on 4-6-02 but I released her back to normal work on 6-18-02. I will talk with the insurance carrier about

this and it may be that we will need to get an IME to help determine causality for her current symptoms.

*Id*.

11. On May 6, 2003, Claimant saw Michael T. Phillips, M.D., at the request of the Idaho State Insurance Fund. Dr. Phillips reviewed medical records and examined Claimant. Dr. Phillips diagnosed a contusion of Claimant's right chest and right upper extremity pain and paresthesia of undetermined etiology. He noted, "Her present cervical and right upper extremity pain is similar to that experienced following an industrial [*sic* – accident] in April of 2002. More probably than not her present pathology is the result of temporary aggravation of the pre-existing condition." Exhibit R. He requested an MRI.

12. The cervical MRI was accomplished on May 12, 2003, and revealed a moderate sized annular protrusion at the C6-7 disc. Dr. Phillips opined that that condition appeared to be the product of a temporary aggravation of the April 2002 injury, rather than the January 25, 2003, accident and injury. He further opined that the chest contusion suffered in the January 2003 accident had resolved without impairment. He recommended physical therapy, anti-inflammatory medications, and limited work activity for six weeks.

13. On September 25, 2003, Claimant saw Gerald R. Moress, M.D., a neurologist, and David Verst, M.D., an orthopedic surgeon, (the panel) at the request of Pinnacle Risk Management. The panel examined Claimant and reviewed medical records and imaging studies. The panel reached the following diagnoses:

1. Right shoulder subacromial bursitis with impingement.

2. Chronic cervical pain syndrome with underlying degenerative disc disease and no verifiable radiculopathy.

3. Chronic history of pain syndrome involving the neck, chest, and shoulder, tension myalgia.[1]

4. Chronic anxiety, depression.

5. Chronic low back pain syndrome with degenerative disc disease.

6. Prior history of right hemispheric CVA by history without clinical residual.

7. Hypertensive cardiovascular disease with history of PTCA's.

8. Morbid obesity with BMI of 44.[2]

Exhibit S.

14. The panel related that Claimant's right shoulder problem is the only residual from the 2002 accident. Her cervical condition is related to her pre-existing "fibromyalgia" and resulted in no impairment. The panel assigned a 2-25% whole person PPI rating for Claimant's cardiovascular condition. Other than her right shoulder complaints, the panel attributes most of her present conditions to her pre-existing "fibromyalgia" or tension myalgias.

15. On November 6, 2003, Claimant saw Joseph M. Verska, M.D., an orthopedic surgeon, at her attorney's request. Dr. Verska examined Claimant and reviewed records and diagnostic studies. Dr. Verska reached the following opinions and conclusions:

> This patient has had numerous medical situations that really confuse this picture. Those being of cardiac history, fibromyalgia, some psychosocial issues, as well as some preexisting pathology in her cervical spine.
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> I would attribute most of her neck and arm pain to this January 2003 injury, most being 90%.[3] I would state that her preexisting pathology was most likely asymptomatic by history up until her January 2003 injury. If the patient had no preexisting cervical stenosis, the chances are she might not have gone to the trouble with her neck and arm pain, but the fact that she was born with a small canal and was asymptomatic prior to her injury is the facts that are given. The

[1] Claimant had been variously diagnosed with fibromyalgia in the past; however, the panel was skeptical of that term as it has been overused and has no objective findings. Therefore, they have substituted the term "tension myalgia" that relates to a cocontraction of muscles leading to diffuse pain in specific areas of the body with underlying depression, anxiety, and sleep problems.

[2] At the time of the hearing, Claimant stood 5'3" tall and weighed 274 pounds. The medical records reflect that obesity has been a long-standing issue for her.

[3] Dr. Verska relates the remaining 10% to the 2002 injury.

fact is that she had problems after her January injury and was asymptomatic prior to that period.

Exhibit T.

Dr. Verska is recommending a two-level fusion at C5-6 and C6-7. He anticipates that after six weeks to three months post-surgery, Claimant would be able to return to work without any restrictions.

16. In a letter to Claimant's attorney dated August 5, 2004, Dr. Verska indicated that Claimant's chest pain is not cardiac in nature but is referred from her neck. He rated Claimant at 5% whole person PPI for her cervical radiculopathy and stenosis if untreated and 20% if a fusion is performed.

17. On August 17, 2005, Claimant saw Peter Taylor, M.D., an orthopedic surgeon, at her attorney's request. Dr. Taylor is associated with Dr. Verska in the Twin Falls office. He reviewed medical records (with the exception of the Moress-Verst IME) and examined Claimant. He came to the following diagnoses:

1. Morbid obesity.
2. Hypertension and hyperlipidemia.
3. No evidence of fibromyalgia.
4. No evidence of previous cerebrovascular accident.
5. Adult onset diabetes mellitus (type II).
6. Cervical stenosis in part related to congenital narrowing of the cervical canal and in part to related industrial injury, see below.
7. Suspect neurogenic claudication of the lower extremities related to spinal stenosis. Suspect etiology again related to probability of congenital narrowing and trauma, see below.
8. Status post contusion chest, resolved, related to industrial injury, see below.
9. Status post bilateral carpal tunnel release with no known residuals.
10. Mild adhesive capsulitis, right shoulder, manifested by scapulohumeral dysrhythymia and impingement syndrome on a more probable than not basis industrial related, see below.

11. Left cervical torticollis, see below.

Exhibit X.

18. Dr. Taylor concluded that Claimant's cervical radiculitis and right shoulder and arm discomfort was temporarily aggravated by her 2002 accident and permanently aggravated by her 2003 accident. He apportioned 90% to the two industrial accidents and 10% to pre-existing conditions based on his understanding that she was asymptomatic in those areas prior to the 2002 accident. He does not believe Claimant is at MMI regarding her right shoulder. Dr. Taylor opined that Claimant's lumbar difficulties were temporarily aggravated by her two accidents but her current problems are the result of the natural progression of her lumbar disc disease. He relates her morbid obesity to pre-existing conditions as well as the accidents and has created a significant impairment that has left her totally disabled.

19. Dr. Taylor would like a CT scan of Claimant's cervical and lumbar spine and a right shoulder MRI. He believes a C5-6, C6-7 decompression would help alleviate her cervical pain and radicular symptoms in her right upper extremity.

20. Claimant testified that she would like the surgery, but cannot afford it.[4]

## DISCUSSION AND FURTHER FINDINGS

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code

[4] Claimant apparently bought a mobile home and a vehicle with the settlement proceeds received from her settlement with Employer and its sureties and has no funds remaining.

§72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281,

939P.2d 854, 857 (1997). An odd-lot worker is one "so injured that he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a super human effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

21. Jason Spooner, a vocational consultant, is the only vocational expert involved with this case. He was retained by Claimant and initially met with her on June 24, 2004. He obtained her work and education histories, reviewed medical records and a functional capacity evaluation that placed Claimant in the sedentary work category on a marginal basis, with the proviso that she would not be able to do even that type of work on an ongoing basis, i.e., not more than two hours during an eight-hour work day. Based on Mr. Spooner's review of the matter, he concluded that Claimant was totally and permanently disabled:

> All right. With the functional capacity I looked at – it would be dated towards the summer – and he indicated in the last paragraph that it would be doubtful that she could do this type of work on an ongoing basis. And that's when he talked about sedentary work at a marginal basis. And then he said also that she wouldn't be able to do sedentary activities more than two hours during an eight-hour workday. And I took that into account.
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> I took her education into account, too. At the same time I was looking at that. She's basically a high school graduate, and she took some courses briefly at Great Basin Community College in Elko, Nevada, but she didn't get any type of certifications or degrees.
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> And basically, given her education and then also the functional capacity evaluation, they also stated that she had poor bilateral dexterity, which is pretty important for someone who's not going to be in a skilled position, looking for sedentary work and having poor bilateral dexterity – Okay. Having poor bilateral

> dexterity in her upper extremities is also a huge negative given her education level and work experience. And then from there, Dr. Taylor's report on – you know, his report on August 25th of 2005 indicated that she was totally disabled.

Mr. Spooner Deposition, pp. 9-10.

22. The Referee finds that Claimant is totally and permanently disabled pursuant to the odd-lot doctrine in that it would be futile for her, or others on her behalf, to attempt to find employment that she could perform and is available in her labor market. Such disability is effective on April 8, 2003, the date of the alarm clock incident.

Idaho Code § 72-332 provides:

> **Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
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> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;

2. The impairment was manifest;

3. The impairment was a subjective hindrance to employment; and,

4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

23. Prior to the alarm clock incident, Claimant was released to return to work without restrictions from both the 2002 and 2003 industrial accidents. The record is clear that no condition pre-existing the 2002 accident was a subjective hindrance to her obtaining and retaining employment. With the exception of some intermittent low back complaints, all of her pre-existing conditions resulted in no residua. As stated in *Garcia v. J.R. Simplot Co.*, 115 Idaho 966, 772 P.2d 173 (1989), a claimant must show that a disability would not be total "but-for" a pre-existing condition. Here, "but-for" the non-industrial alarm clock incident, it can reasonably be inferred that Claimant would have gone to work that day and performed her duties just as she did the day before. No physician has convincingly tied in the physical effects of the alarm clock incident to either of the subject accidents. Even had they done so, any injuries that may have lingered from the two subject accidents would not constitute pre-existing conditions.

24. The Referee finds that Claimant has failed to prove ISIF liable pursuant to Idaho § 72-332.

## CONCLUSIONS OF LAW

1. Claimant has failed to prove ISIF is liable pursuant to Idaho Code § 72-332.

2. All other issues are moot.

## RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __1st___ day of ____September_____, 2006.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:

__/s/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the __11th___ day of __September__, 2006, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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_____/s/_____

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